Supreme Court, U.S.
FILED
SEP 10 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-6 (2)

In the Supreme Court of the United States

OCTOBER TERM, 1985

HARRY H. ZUCKER, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

CHARLES FRIED
Acting Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioners contend that Congress deprived them of contractual or property rights, in violation of the Takings Clause of the Fifth Amendment, when it repealed a 1% add-on to the automatic cost-of-living adjustment for federal employee retirement benefits.

1. In 1962, Congress amended the Civil Service Retirement Act to provide an automatic cost-of-living adjustment (COLA) for retirement annuities of federal employees. Pub. L. No. 87-793, § 1102(b), 76 Stat. 869, amending what is now 5 U.S.C. 8340. In 1969, Congress further amended the statute to provide for 1% of the annuity to be added on top of the COLA. Pub. L. No. 91-93, § 204, 83 Stat. 139. In 1976, Congress repealed this 1% add-on. Pub. L. No. 94-440, § 1306, 90 Stat. 1462.

Petitioners are retired employees of various federal agencies. Two of them retired before the 1976 amendment, two after. They brought suit in the United States District Court for the Southern District of New York, contending that the 1976 amendment was an unconstitutional taking of a contractual or property right in the 1% add-on.[1]

The district court rejected their claim, on the ground that petitioners have no "constitutionally protected property interest" in their public benefits, which "Congress may grant, increase or decrease" subject only to due process limitations against arbitrary action (Pet. App. 11a, 13a). The court of appeals affirmed, also holding that federal retirees have no constitutionally protected property or contractual interest in the COLA adjustment (*id.* at 4a-7a). The court of appeals limited its holding to the COLA increases, and refrained from deciding whether there is constitutional protection for "the basic annuity to which the retiree became entitled upon retirement" (*id.* at 5a, 7a).[2]

2. The Federal Circuit's decision is in accord with congressional intent and the case law. There is no ruling of this Court or any court of appeals to the contrary.

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[1]The petition is unclear as to when it is contended that the asserted right vested. As to petitioners Zucker and Sapienza, who retired before the 1976 amendment, their position could be that the right vested on the date of retirement. As to petitioners Acker and Corcoran, who retired after the 1976 amendment, their position would have to be that the right vested at some unspecified time during their federal employment.

[2]In addition to their Takings Clause claim, petitioners pursued a due process claim below. They do not appear to press that claim in this Court (but see Pet. i). In any event, the courts below correctly rejected petitioners' due process arguments (Pet. App. 3a-4a, 11a-13a). Petitioners have failed to show that Congress's rescission of the 1% add-on was in any way invidiously discriminatory or irrational. See, *e.g.*, *Flemming* v. *Nestor*, 363 U.S. 603, 611-612 (1960); *Richardson* v. *Belcher*, 404 U.S. 78, 81 (1971).

As an initial matter, "[i]t is by now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality * * *." *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976) (citations omitted). Not every economic interest is a property interest under the Takings Clause. *Kaiser Aetna* v. *United States*, 444 U.S. 164, 178 (1979); *United States* v. *Willow River Power Co.*, 324 U.S. 499, 502 (1945). Even if an interest in public benefits may be entitled to procedural due process protection, it does not necessarily also qualify for protection under the Takings Clause. *Richardson* v. *Belcher*, 404 U.S. 78, 81 (1971).[3]

In *United States Railroad Retirement Board* v. *Fritz*, 449 U.S. 166 (1980), this Court was presented with a claim that certain provisions of the Railroad Retirement Act of 1974 denied equal protection guaranteed by the Due Process Clause of the Fifth Amendment in the way windfall retirement benefits were distributed. The Court, before addressing the equal protection claim, said: "There is no claim here that Congress has taken property in violation of the Fifth Amendment, since railroad benefits, like social security benefits, are not contractual and may be altered or even eliminated at any time." 449 U.S. at 174 (citations

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[3]"[T]he analogy drawn in *Goldberg* [v. *Kelly*, 397 U.S. 254 (1970)] between social welfare and 'property,' 397 U.S., at 262 n.8, cannot be stretched to impose a constitutional limitation on the power of Congress to make substantive changes in the law of entitlement to public benefits." *Richardson* v. *Belcher*, 404 U.S. 78, 81 (1971).

The petition (Pet. 14) quotes language from *American Postal Workers Union* v. *United States Postal Service*, 707 F.2d 548, 554 (D.C. Cir. 1983), cert. denied, No. 83-973 (Mar. 19, 1984), that a federal retiree acquires "an interest protected by the due process clause" in retirement benefits at the level in effect at the time of retirement. That decision, unlike the petition, however, involved a claim of procedural due process protection; there was no assertion of a right to substantive protection under the Takings Clause. See also note 2, *supra*.

omitted). The Court had similarly ruled in *Flemming* v. *Nestor*, 363 U.S. 603, 608-611 (1960), that there is no " 'accrued property right' " in social security benefits. See also *Hisquierdo* v. *Hisquierdo*, 439 U.S. 572, 575 (1979); *Dodge* v. *Board of Education*, 302 U.S. 74 (1937); *Pennie* v. *Reis*, 132 U.S. 464 (1889).

Petitioners offer no reason why their case is distinguishable from *Fritz* and *Nestor*. All involved Congress's efforts to fine-tune retirement benefit programs funded by the federal government; in neither *Fritz* nor *Nestor* did the Court intimate that the benefits, because they were post-retirement, were immune from such alteration as somehow already vested. See *Fritz*, 449 U.S. at 174; *Nestor*, 363 U.S. at 610; cf. *Lynch* v. *United States*, 292 U.S. 571, 576-577 (1934) (discussed at note 9, *infra*). Instead, the Court held that Congress is entitled to amend "social and economic legislation" (*Fritz*, 449 U.S. at 174) in its efforts at "proper allocation of the Nation's resources." *Nestor*, 363 U.S. at 610. See also *Dandridge* v. *Williams*, 397 U.S. 471 (1970); *United States* v. *Teller*, 107 U.S. 64, 68 (1883) ("No pensioner has a vested legal right to his pension. Pensions are the bounties of the government, which Congress has the right to give, withhold, distribute, or recall, at its discretion. *Walton* v. *Cotton*, 19 How. 355"). To the extent that petitioner would "engraft" upon our economy the impediment of " 'accrued property rights' " that *Nestor* warned against (363 U.S. at 610), Congress would be discouraged from creating benefits in the first place.

As discussed below, in passing the 1% COLA adjustment Congress was motivated by precisely the sort of social and economic aims to which this Court has alluded. Conversely, regardless of what the congressional intent may have been with respect to the basic annuity, there is no evidence that Congress regarded the COLA adjustment as conferring a vested right in future annuities immune from subsequent

legislative alteration without just compensation.[4] Petitioners' citations are only to the legislative history of the original Retirement Act of 1920, which established the basic annuity and is not at issue here. Similarly, as petitioners acknowledge, the statutory language it quotes (Pet. 11-12) derives directly from the 1920 Act.

3. The COLA adjustment was part of the comprehensive civil service legislation, including pay raises, that was enacted in 1962. Pub. L. No. 87-793, § 1102(b), 76 Stat. 869. The administration explained that while the pay proposals were intended to attract better employees, and were thus compensatory, the COLA adjustment was intended to alleviate hardship caused by inflation among current annuitants, and thus was essentially social welfare legislation. Indeed, the Chairman of the Civil Service Commission stated that the Commission believed "that annuity adjustments should not be tied to the pay proposals currently pending before the Congress. The pay legislation proposed by the President is intended primarily to enable the Government to better compete in the labor market and has no direct bearing upon the adjustment needs of annuitants." *Increasing Civil Service Retirement Annuities: Hearings on H.R. 3316, H.R. 10706, and Similar Bills Before the House Comm. on Post Office and Civil Service*, 87th Cong., 2d Sess. 17 (1962) *[hereinafter cited as Hearings].*[5]

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[4]The intent of the legislature is important in determining whether a right protected by the Takings Clause has been created. See *Northern Cheyenne Tribe* v. *Hollowbreast*, 425 U.S. 649 (1976). Cf. *Bishop* v. *Wood*, 426 U.S. 341, 345 (1976); *Nestor*, 363 U.S. at 610.

[5]Another part of the administration testimony further elaborated on the point that the COLA adjustment was viewed as a means of alleviating current hardship among retirees, rather than as a part of the compensation package designed to attract future employees:

> Adjustments in pay scales and improvements in the retirement system for active employees are two important methods available to the Government for attracting and retaining competent personnel. These actions taken to enable the Government to better

Representative Broyhill, a member of the Committee and a key figure in federal employee legislation,[6] responded to this testimony by supporting the concept that the COLA adjustment was a social welfare provision rather than a contract with government employees:

> Now I support several portions of your statement where you point out that you had another problem or another responsibility in considering increases for active employees, keeping it competitive with other employment in free enterprise and yet with those on the annuity that is not a problem, it is more of a humane aspect or a moral responsibility and not one of a competitive responsibility.

Hearings 27. The intent expressed in these statements was carried through in the final legislation, which made the COLA adjustment applicable to current annuitants. Pub. L. No. 87-793, § 1101(a), 76 Stat. 868. If the intent had been to offer prospective employees a vested right as an inducement to accept federal employment, there would have been no reason to make the adjustment available to current annuitants.[7]

> compete in the labor market have no direct bearing upon the adjustment needs of annuitants. Nor do adjustments to annuitants contribute in any degree toward the objective sought by pay adjustments and retirement liberalizations for the future.
>
> The basic problem of annuitants is that they receive fixed incomes and are adversely affected by increases in the price level.

Hearings 12 (May 9, 1962, letter from John W. Macy, Jr., Chairman, Civil Service Commission, to the Chairman of the House Committee on Post Office and Civil Service, entered into the record during the former's testimony).

[6]Representative Broyhill represented a district comprised of northern Virginia surburbs of Washington, D.C. — a constituency including large numbers of federal employees.

[7]The social welfare nature of the federal retirement system is also indicated by the fact that the employee and matching agency contributions do not come close to meeting the expenses of the Civil Service

Similarly, the legislative history of the 1% add-on confirms the conclusion that Congress perceived the COLA adjustment as a welfare measure that could be adjusted in light of experience, just as any other public benefit. The House Committee Report commented:

> In the matter of adjusting annuities after retirement, insurance practice would guarantee that whatever annuity an employee had earned at the time of retirement should be preserved without change. On the other hand, humanitarian considerations would urge that the welfare of the retired person is the major concern, and that annuities should be adjusted to changing needs. The latter theory has prevailed through congressional action * * *.

H.R. Rep. 91-158, 91st Cong., 1st Sess. 14 (1969). The 1% add-on was thought necessary at the time to make up for the lag between the occurrence of an increase in the price index and the adjustment of annuity checks. *Id.* at 16. In keeping with the social welfare purpose of the add-on, it too was made effective as to existing retirees. Pub. L. No. 91-93, § 207(a) and (b), 83 Stat. 140.[8]

Retirement Fund. For example, in fiscal year 1982, contributions to the Fund by the Treasury out of general revenues (exclusive of interest paid on Treasury securities held by the Fund) constituted 48% of the Fund's income. U.S. Office of Personnel Management, *Compensation Report, Fiscal Years 1981 & 1982* 31 (1984).

[8]This case thus differs from *United States* v. *Larionoff*, 431 U.S. 864 (1977), relied on by petitioners (Pet. 14). In *Larionoff*, the Court construed a statute establishing re-enlistment bonuses as conferring a vested right to the bonus as of the date a serviceman makes the decision to re-enlist, on the ground that the purpose of the statute was "a very specific sort of incentive" to induce re-enlistments. *Id.* at 874. By contrast, the 1% add-on was designed not as a means to induce people to accept federal employment, but rather as a means to alleviate hardship

After enactment of the add-on, however, the inflation rate increased substantially; as a result, the cost of the add-on was greater than anyone had expected. See, *e.g.*, 122 Cong. Rec. 31914 (1976) (Reps. Rousselot and Adams). As Representative Udall explained, "When the original 1-percent kicker was adopted by the Congress, no one knew for sure how it would work. * * * We made [an] adjustment, but we overadjusted it, to such an extent that this group of retirees received over 25 percent more in their retirement benefits than the actual increase in the cost of living." 122 Cong. Rec. 31917 (1976). By repealing the add-on, Congress was simply "making a practical adjustment in the light of experience." 122 Cong. Rec. 31913 (1976) (Rep. Derwinski).

It is worth noting, finally, that when the 1% add-on was passed in 1969, Congress was acting against a background of judicial decisions uniformly holding that federally-funded pension benefits are a matter subject to legislative adjustment.[9] It would require strong evidence to conclude

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among existing retirees. *Larionoff* recognized that more general sorts of expectations were not protected. *Id.* at 879.

Larionoff also undermines petitioners' "a[illegible]native" (but completely derivative) argument that they have a *contractual* interest protectable under the Takings Clause (Pet. 15-17). *Larionoff* indicates that a federal employee's entitlement to pay and other benefits "must be determined by reference to the statutes and regulations governing [compensation], rather than to ordinary contract principles." 431 U.S. at 869 (footnote omitted). See also *Kizas* v. *Webster*, 707 F.2d 524, 535 n.49 (D.C. Cir. 1983), cert. denied, 464 U.S. 1042 (1984) (and cases cited therein). In any event, that argument is also answered by the fact — even more telling under contract law — that petitioners cite no evidence that one principal (Congress) had any intent to enter into the contract petitioners claim exists. Once more, petitioners' evidence is all limited to the Retirement Act of 1920, which is not at issue.

[9]See the line of cases, already well established by then, discussed at pages 3-4, *supra*. See also *Stouper* v. *Jones*, 284 F.2d 240, 242 (D.C. Cir. 1960) (citation omitted) (sustaining retroactive application of a statute discontinuing plaintiff's federal disability annuities under the

that Congress intended to deviate from this precedent and clothe the COLA adjustment with an immunity from subsequent legislative change absent just compensation. By the same token, the settled state of the law undercuts any equitable claim that the 1976 repeal of the 1% add-on denied petitioners' reasonable expectations in receiving the benefit.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Acting Solicitor General

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Civil Service Retirement Act, on the ground that "a pension granted by the Government confers no right which cannot be revised, modified or recalled by subsequent legislation").

One of the cases in the line discussed earlier, *Lynch* v. *United States*, 292 U.S. 571 (1934), is cited by petitioners (Pet. 15) since it held that the United States could not repudiate contracts of war risk insurance. The Court there, however, specifically contrasted the contractual obligation under insurance contracts with "[p]ensions, * * * [which] are gratuities. They involve no agreement of parties; and the grant of them creates no vested right. The benefits conferred by gratuities may be redistributed or withdrawn at any time in the discretion of Congress." *Id.* at 577 (citations omitted).

Petitioners also rely (Pet. 13) on *Kizas* v. *Webster*, 707 F.2d 524 (D.C. Cir. 1983), cert. denied, 464 U.S. 1042 (1984), to support their contention that an employee's statutory entitlements may not be altered. Nothing, however, in *Kizas* suggests that statutory rights are immune from legislative (as opposed to agency) adjustment. In fact, the decision suggests the contrary, by pointing out that "property rights" that are protected by the guarantee of procedural due process are not necessarily "property" for purposes of the Takings Clause (petitioners' claim). 707 F.2d at 539-540. Finally, the holding in *Kizas* directly refutes petitioners' contractual claim. See *id.* at 534-538.